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COURT OF CRIMINAL APPEALS
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To the Court of Criminal Appeals of Texas

No. PD-0469-19

FILED
COURT OF CRIMINAL APPEALS
5/27/2022
DEANA WILLIAMSON, CLERK

Ex parte Nathan Sanders

Movant/Petitioner Nathan Sanders's Motion for Rehearing Following Opinion

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On Petition for Discretionary Review from the Seventh Court of Appeals; Cause No. 07-18-00335-CR

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16 May 2022

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0469-19

EX PARTE NATHAN SANDERS	FROM THE SEVENTH COURT OF APPEALS AT AMARILLO

APPELLANT'S MOTION FOR REHEARING
PURSUANT TO RULE 79.2, TEXAS RULES OF APPELLATE PROCEDURE

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Movant/Petitioner, Charles Barton, by and through his counsel of record, Mark W. Bennett and Lane A. Haygood, moves this Court to reconsider its opinion issued on April 6, 2022, and reverse the decision of the Seventh Court of Appeals.

STATEMENT OF THE CASE

The Court below held that Texas Penal Code § 42.07(a)(7), the electronic harassment statute, was unconstitutional as vague and overbroad under the First Amendment. This Court, on the other hand, in a majority opinion signed by five judges, held that Sec. 42.07(a)(7) "fails to implicate the First Amendment's freedom of speech protections because it . . . prohibits non-speech conduct." Because the Colorado Supreme Court, in *People v. Moreno*, 506 P.3 849 (Colo. Mar. 28, 2022), decided a substantially similar question differently, this Court should re-examine its holding, especially since the underlying issue has been mooted by the State's subsequent dismissal of the case while the opinion was pending.

ARGUMENT AND AUTHORITIES

In *Moreno*, the Colorado Supreme Court examined a statute that provided that

> [a] person commits harassment if, with intent to harass, annoy, or alarm another person, he or she . . . [d]irectly or indirectly initiates communication with a person or directs language toward another person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, or other interactive electronic medium that is obscene.

Moreno, 506 P.3d at 852 (emphasis in original). The language used by the Colorado Legislature is substantially similar to that used in Sec. 42.07(a)(7), differing only in incidents, not in essence.

1. The Court's central confusion is treating speech as non-speech.

Contrary to this Court's holding, however, the Colorado Supreme Court held that the statute at issue "prohibits certain types of communications" and therefore "implicates the free-speech protections afforded by the United States and Colorado constitutions." *Moreno*, 506 P.3d at 853, *citing People v. Smith*, 862 P.2d 939 (Colo. 1993).

In contrast, the majority of this Court held that Sec. 42.07(a)(7) only prohibits "non-speech conduct" because, like telephonic harassment in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), speech intended to inflict emotional distress

for its own sake is "essentially noncommunicative" and does not implicate the First Amendment. But this cannot be the law.

1.1. Scott v. State is improperly decided.

This Court repeats the State's argument that the "core holding" of *Scott* was that harassment is "non-communicative conduct" that does not implicate the First Amendment. Holding that the "speech" at issue in *Scott* (and consequently in this case) is "not speech at all" (see slip op., pg. 9) is at the root of the problem with this decision. If the majority opinion in **this** case is correct, then the same rationale that underlies prohibiting harassing telephone communications and electronic communications must apply. But this is not the case.

1.2. Telephonic and electronic harassment are fundamentally different.

As Presiding Judge Keller pointed out in her dissent in the companion case *Barton v. State*, --- S.W.3d ----, No. PD-1123-19 (Tex. Crim. App. Apr. 6, 2022), the telephonic harassment statute is limited to telephones, while electronic communication is "much more expansive, encompassing anything that could be thought of as an electronic communication" with an intended audience far beyond a single person called on the telephone (*see Barton*, Keller, P.J., dissenting, at page 3). One may annoy with a telephone call without the recipient ever picking up the phone and hearing the words spoken; one may not determine that one has been electronically harassed without opening the email, text message, instant message,

Snapchat, or other electronic message to determine **what** was said. This feeds back into the primary point concerning Sec. 42.07(a)(7) being a content-based regulation. Because Sec. 42.07(a)(7) gathers in its net a large amount of otherwise protected communications (save but for this Court's ad hoc assertion that speech intended to inflict emotional distress is somehow not speech), it must be struck down as overbroad. *See Moreno*, 506 P.3d at 853 ("[A] statute is facially overbroad if it sweeps so comprehensively as to substantially include within its own proscriptions constitutionally protected speech.")

1.3. Electronic communication must be considered "speech."

In order to avoid the compelled conclusion that Sec. 42.07(a)(7) is overbroad, the majority in this case has decided that speech which is intended to cause emotional upset is not "speech" within the meaning of the First Amendment. This argument might carry the day if, as pointed out in Sec. 1.2, *supra*, the gravamen of the offense was causing the phone to ring rather than the **content** of the communication. But this cannot be the case; it cannot be that speech loses is character and becomes "non-speech conduct" outside of the First Amendment based on its purpose or intended message.

Communication intended to cause emotional upset is still communication; it is still speech. Causing a telephone to ring and ring at 3:00 a.m. is not

communication. The intention of speech does not rob it of its protected character; we do not say that true threats are unprotected simply because the speaker intends to convey a threat; true threats are unprotected because historically assault-by-threat has been proscribed as a criminal act. The intention of obscene speech does not render it more or less obscene; its character is determined prior to and independent of the speaker's intent.

Apart from the majority opinion in this case and *Barton*, no court has held that the intent of speech changes its fundamental character. As Presiding Judge Keller pointed out in her dissent in *Barton*, "[t]he 'intent to convey a particularized message' test for determining whether conduct that is ordinarily non-speech is actually expressive has no application to something that ordinarily speech or expression" (*see Barton*, Keller, P.J., dissenting, page 4, *citing Thompson*, 442 S.W.3d at 334-36). If an email to an ex-girlfriend which professes eternal love and regret for the breakup is romantic and speech, then so is an email to that same ex-girlfriend impugning her honor and calling her profane names. While the second may be less pleasant to read and may cause emotional upset, to prohibit speech simply because someone who read or heard that speech was upset or offended must offend the very essence of the First Amendment protections. Human beings engaged in civil society must at times encounter words and ideas which, upon their presentation, cause a

negative reaction in people; the Legislature can no more shield people from that discomfort than they can from other types of upsetting behavior or circumstances. Mere emotional injury has never been sufficient for criminal liability.

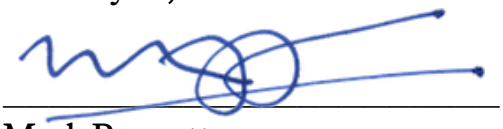
CONCLUSION

Because the majority's decision in this case improperly holds that Sec. 42.07(a)(7) is not concerned with speech, but rather "non-speech conduct," the decision conflicts with that of our sister states and this Court's own prior precedent in cases like *Thompson*. But more than that, the majority's opinion re-writes Sec. 42.07(a)(7) to apply to any repeated electronic communications that are unwanted, regardless of the actual words used. It must, because otherwise, the regulation would be content-based and subject to being struck down under *Thompson*. Since it is impossible to believe that this Court intended to impliedly overrule *Thompson* and rewrite Sec. 42.07(a)(7) to include any communication "intended to harass" (as was struck down in *Moreno*), this Court should grant rehearing and revise its opinion to reverse the decision of the Seventh Court of Appeals.

PRAYER FOR RELIEF

Respectfully, Mr. Sanders prays that this Court grant rehearing for the reasons stated herein and reverse the decision of the court of appeals below.

Thank you,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion for Rehearing was served on counsel for the State via electronic service through the Texas e-filing manager on the same date as the original was electronically filed with the Clerk of this Court.

/s/ Lane Haygood
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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

According to Microsoft Word's word count, this motion contains 1,623 words, not including the parts of the motion not required to be counted under the Texas Rules of Appellate Procedure.

/s/ Lane Haygood
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